

REISSUE DECLARATION AND POWER OF ATTORNEY

Attorney Docket No. 9353-8RE

As a below named inventor, I hereby declare that:

My residence, mailing address and citizenship are stated below next to my name. I believe I am an original, first and joint inventor of the subject matter which is described and claimed in United States Patent No. 6,430,467 ("the '467 patent"), issued on August 6, 2002, and for which a reissue patent is sought on the invention entitled "Processes For Packaging Perishable And Other Products."

The specification of which

☒ is attached hereto.

☐ was filed on _____ as reissue application
number ____ / _____
and was amended on _____ (if applicable).

I have reviewed and understand the contents of the above identified specification, including the claims.

I acknowledge the duty to disclose information which is material to patentability as defined in 37 C.F.R. 1.56.

I verily believe the original patent to be wholly or partly inoperative or invalid, for the reasons described below. (Check all boxes that apply.)

☐ by reason of a defective specification or drawing.

☒ by reason of the patentee claiming more or less than he had the right to claim in the patent.

☐ by reason of other errors.

At least one error upon which reissue is based is described below:

The assignee of the '467 patent, Rock-Tenn Company ("Rock-Tenn"), is presently engaged in five patent litigations concerning the '467 patent pending in the United States District Court for the Northern District of Georgia. *Rock-Tenn Company v. Cryovac, Inc.*, Civ. Action No. 1:02-CV-2437-JTC; *Rock-Tenn Company v. Pactiv Corp.*, Civil Action No. 1:02-CV-2800-JTC; *Rock-Tenn Company v. C&M Fine Pack, Inc.*, Civil Action No. 1:02-CV-2438-JTC; *Rock-Tenn Company v. Anchor Packaging, Inc.*, Civil Action No. 1:02-CV-3080-JTC; and *Clear Lam Packaging, Inc. v. Rock-Tenn Company*, Civil Action No. 1:03-CV-2706-JTC (collectively referred to as "the litigations"). The parties opposing Rock-Tenn in the litigations are collectively referred to as "the opposing parties."

In the litigations, the opposing parties allege that certain materials and information constitute invalidating prior art to the '467 patent. The opposing parties also contend that the '467 patent is unenforceable due to alleged inequitable conduct by the Applicants or their attorneys in allegedly failing to disclose prior art to the PTO during prosecution of the application that led to issuance of the '467 patent. Alleged prior art identified by the opposing parties in the litigations is listed in the accompanying Information Disclosure Statement ("IDS"). The opposing parties have not provided Applicants with copies of all of the documents and materials that are listed on the IDS, and designated other documents and materials as confidential under the terms of the Protective Orders entered in the litigations. Additionally, the opposing parties' descriptions of some of the alleged prior art is so vague and indefinite that Applicants have not been able to determine whether any documentation exists concerning such alleged prior art. Applicants, therefore, enclose only copies of the non-confidential materials that the opposing parties have produced in the litigations or that Applicants have been able to identify and obtain. Pleadings, discovery requests and responses, motions and a transcript filed in the litigations that allegedly substantiate the opposing parties' allegations of invalidity and unenforceability also accompany this Declaration.

In particular, the opposing parties contend that alleged on-sale activity of one of the opposing parties, Clear Lam, invalidates all of the asserted claims in the '467 patent as anticipated under 35 U.S.C. § 102(b). *See, e.g.*, Defendants Anchor Packaging, Inc.'s, C&M Fine Pack, Inc.'s, and Cryovac, Inc.'s Response to Rock-Tenn's Expedited Motion to Consolidate and to Modify the Scheduling Order dated October 6, 2003 at 4; and Plaintiff Clear Lam's Memorandum of Law in Opposition to Rock-Tenn's Expedited Motion to Consolidate and to Modify the Scheduling Order ("Clear Lam's opposition") dated October 6, 2003 at 13-14. Applicants understand that Clear Lam's alleged on-sale activity consists of alleged offers for sale by Clear Lam of the patented process of the '467 patent. *See* Clear Lam's Opposition at 13-14.

Applicants understand, however, that, aside from a non-confidential videotape that is listed on and provided with the accompanying IDS, Clear Lam designated the documents that allegedly support Clear Lam's alleged on-sale bar activity as highly confidential under the Protective Order entered in the litigation against Clear Lam. Recently, however, Clear Lam permitted one of the inventors of the '467 patent, Mr. D'Amelio to review Clear Lam's highly confidential documents that allegedly support these particular invalidity contentions. Clear Lam prohibited Mr. D'Amelio from disclosing or discussing the content of the documents with anyone other than specified counsel for Rock-Tenn and the CEO of Rock-Tenn. Applicants further understand that despite being requested to do so, Clear Lam refuses to remove the confidentiality designation from its allegedly supporting documents.

With respect to the non-confidential videotape that Clear Lam alleges supports these particular invalidity allegations, the videotape does not disclose at least: the date that the videotape was made; where the videotape was made; whether the videotape was publicly disclosed more than one year before the application that led to issuance of the '467 patent; or the vast majority of the elements of the claims of the '467 patent.

Independent claim 20 of the '467 patent presently claims:

20. A process for preparing case ready meat products for shipping and sale, the meat products thereby adapted to be displayed for sale in a display case at a retail point of sale, comprising:

- A. providing a plurality of a first nonfoam trays having a bottom and walls; the first trays having a plurality of separation structures; the separation structures adapted to cause the trays to denest automatically from other trays;
- B. providing a plurality of second nonfoam trays having a bottom and walls; the second trays having a plurality of separation structures; whereby the separation structures on the second trays are adapted not to nest with separation structures on the first trays; the separation structures adapted to cause the trays to denest automatically from other trays;
- C. whereby the first and second trays are provided in a stack in a manner so as to automatically denest in a dispensing station;
- D. dispensing the trays from the stack in a dispensing station;
- E. placing case ready meat product into at least some of the trays, the meat product ready to be displayed for sale in a display case at a retail point of sale; and
- F. sealing at least some of the trays and meat products with a closure.

Dependent claim 23 presently claims:

23. A process according to claim 20 wherein the separation structures have the same shape on all trays and are located in the same position on all trays.

In the litigations, the opposing parties appear to argue that the claim language (1) "separation structures" means: any structure that creates any separation between the trays; and (2) "the separation structures adapted to cause the trays to denest automatically from other trays" means: any structure that creates any separation between the trays that cause the trays to denest automatically from other trays regardless of the reliability, efficiency or speed of the automatic denesting. Based at least in part on this apparent interpretation, the opposing parties contend that several of the references listed on the accompanying IDS, including the above described alleged on-sale activities, invalidate or render unenforceable claims of the '467 patent. *See, e.g.*, the opposing parties' responses and supplemental responses to Rock-Tenn's interrogatory nos. 3 and 4. Contrary to the opposing parties' claim interpretation, however, Applicants never understood, and still do not understand, this claim language to have such a meaning. Applicants have always understood that the claim language "separation structures" means: three-dimensional structures that prevent the trays from locking together and that cause physical separation between trays for purposes of performing in an automatic denester on a case ready meat packaging line. Applicants have always understood the claim language "the separation structures adapted to cause the trays to denest automatically from other trays" to mean: such separation structures cause the trays to denest automatically from other trays in a reliable, efficient and fast manner on a case ready meat packaging line. The automatic denesting of the nonfoam trays is more reliable, efficient and fast than what existed prior to the invention for nonfoam trays for use in packaging case ready meat

In the litigations, Applicants further understand that the opposing parties allege that a "September 9, 1996 Champion deep meat tray" (that the opposing parties further vaguely describe only as a "nonfoam meat tray with separation structures") is invalidating prior art to independent claim 20, and the claims depending from claim 20, of the '467 patent. See opposing parties' responses and supplemental responses to Rock-Tenn's interrogatory no. 3 from the litigations identified on the accompanying IDS. Applicants understand that it does not appear that the opposing parties to the litigations have produced any documents concerning the vaguely described "September 9, 1996 Champion deep meat tray".

Although Applicants are not able to specifically identify this tray from the opposing parties' vague description, Applicants recently learned that it appears that the opposing parties' may be referring to nonfoam trays that were manufactured and sold by Rock-Tenn. Prior to July 1999, a company named Champion Systems, Inc. was a broker for Rock-Tenn that sold trays manufactured by Rock-Tenn to various customers, including at least two meat processors, Colorado Boxed Beef ("CBB") and Fairbank Farms. Before July 1999, at least CBB and Fairbank Farms purchased some of these nonfoam trays for use in packaging case ready ground beef. Internally, Rock-Tenn referred to at least some of these trays as "Champion" trays. Photographs of these trays and a 1998 Rock-Tenn brochure relating to CBB are listed in the accompanying IDS. Each of these nonfoam trays had structures in the top interior corners of the trays that were the same shape and that were in the same position on all trays. Applicants believe that the structures on these trays are not separation structures as disclosed in the '467 patent. Applicants also believe that the structures on these trays are not adapted to cause the trays to denest automatically from other trays; and that CBB and Fairbank Farms did not provide the trays in a stack in a manner so as to automatically denest in a dispensing station. Applicants believe that CBB and Fairbank Farms manually denested the trays.

Recently during discovery in the litigations, Applicants also learned that prior to July 1999, Rock-Tenn sold nonfoam trays having Rock-Tenn drawing number RT09505 to a food processor, Excel Specialty Products, for use in packaging precooked beef in pouches. These trays had structures in the top interior corners of the trays that were the same shape and in the same position on all trays. A drawing of these trays is identified on the accompanying IDS. Applicants recently learned that that Excel may have automatically denested these trays in Excel's process for packaging the pouches of precooked beef in the trays. Applicants believe that the structures on these trays are not separation structures as disclosed in the '467 patent. Applicants do not know if the automatic denesting of these trays was reliable, efficient or fast, but believe that it is unlikely that it was as reliable, efficient or fast as disclosed in the '467 patent.

In light of the opposing parties' apparent claim interpretation and invalidity contentions, and the newly discovered information, it now appears that Applicants did not fully appreciate the scope of the invention disclosed in the '467 patent or the prior art. It appears that the inventors inadvertently claimed more than desired in claims 20 and 23 of the '467 patent. To clarify the process, independent claim 20 should be amended to include (1) the further limitation that at least some of the separation structures on the second trays are positioned at locations on the second trays different from the locations at which the corresponding separation structures on the first trays

are located; and (2) further structural enhancements of the trays that provide strength and rigidity to the trays, or contribute to the automatic denesting of the trays in a reliable, efficient and fast manner. These structural enhancements are: The trays have (a) nearly vertical side walls; (b) a plurality of vertical ribs located on the side walls, (c) smooth, contoured corner walls, and (d) a flange having a downturn component of greater than 0.125 inches that extends around the upper extremities of the side walls. Claim 23 should be cancelled.

Applicants further understand that the opposing parties to the litigations contend that the claim language "case ready meat product" includes products other than case ready fresh meat, such as ground turkey, chips and meat chili dip, salad with chicken, nuts, tofu, BBQ chicken, frozen foods, prepared meals, chicken burgers, sausage, fish, non-meat foods, prepackaged stew products, soup including meat, sliced luncheon meat cooked chicken, bakery food products, and marinated chicken. Contrary to the opposing parties' claim interpretation, throughout the specification and claims, the claim language "case ready meat product" means to one of skill in the art: fresh meat prepackaged at a central location in extended shelf life, high oxygen modified atmosphere packaging and that is ready to be displayed for sale in a display case at a retail point of sale. As disclosed in the claims and the specification, the claim language "case ready meat products" does not include poultry. Deleting from the specification all references to perishable products other than fresh meat would improve readability and understanding of the disclosure and claims by persons of lesser skill.

Pursuant to MPEP § 1418, Applicants will continue to disclose to the United States Patent and Trademark Office all information known to the Applicants that is, or that the opposing parties' contend is, material to patentability of the claims under consideration in this reissue application.

All errors corrected in this reissue application arose without any deceptive intention on the part of the Applicants.

POWER OF ATTORNEY: As a named inventor, I hereby appoint the following registered attorney(s) to prosecute this application and transact all business in the Patent and Trademark Office connected therewith.

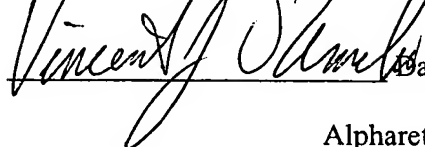
**USPTO Customer No. 20792
Myers Bigel Sibley & Sajovec, P.A.
Post Office Box 37428
Raleigh, NC 27627**

Send correspondence to:	D. Randal Ayers Myers Bigel Sibley & Sajovec, P.A. Post Office Box 37428 Raleigh, NC 27627
Direct telephone calls to:	D. Randal Ayers (919) 854-1400
Facsimile:	(919) 854-1401

Full name of first joint inventor: Vince D'Amelio

Inventor's

Signature:

 Date: 10/23/03

Residence:

Alpharetta, Georgia

Citizenship:

United States of America

Post Office Address:

10655 Oxford Mill Circle
Alpharetta, Georgia 30022

Full name of second joint inventor: Marshall Martin Van Domelen

Inventor's

Signature: Marshall Martin Van Domelen Date: 10/23/03

Residence: Conyers, Georgia

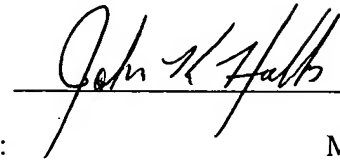
Citizenship: United States of America

Post Office Address: 602 Trophy Lane
Conyers, Georgia 30094

Full name of third joint inventor: John Kerry Hobbs

Inventor's

Signature:



Date:

10/23/03

Residence:

McDonough, Georgia


Citizenship:

United States of America

Post Office Address:

730 Beaver Run Trace
McDonough, Georgia 30253

Full name of fourth joint inventor: Mike Tyberghein

Inventor's
Signature:  Date: 10-23-03

Residence: Roswell, Georgia

Citizenship: United States of America

Post Office Address: 5203 Tealing Drive
Roswell, Georgia 30075

334275

Reissue Litigation Commissioner for Patents

PTO/SB/98 (09-03)

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U.S. Patent and Trademark Office: U.S. DEPARTMENT OF COMMERCE

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STATEMENT UNDER 37 CFR 3.73(b)

Applicant/Patent Owner: Rock-Tenn CompanyApplication No./Patent No.: 6,430,667 B1 Filing/Issue Date: August 6, 2002Entitled: Processes for Packaging Perishable and Other ProductsRock-Tenn Companya Corporation

(Name of Assignee)

(Type of Assignee, e.g., corporation, partnership, university, government agency, etc.)

states that it is:

1. ☒ the assignee of the entire right, title, and interest; or
2. ☐ an assignee of less than the entire right, title and interest.
The extent (by percentage) of its ownership interest is _____ %
in the patent application/patent identified above by virtue of either:

A. ☒ An assignment from the inventor(s) of the patent application/patent identified above. The assignment was recorded in the United States Patent and Trademark Office at Reel 011232, Frame 0903, or for which a copy thereof is attached.

OR

B. ☐ A chain of title from the inventor(s), of the patent application/patent identified above, to the current assignee as shown below:

1. From: _____ To: _____
The document was recorded in the United States Patent and Trademark Office at
Reel _____, Frame _____, or for which a copy thereof is attached.
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☐ Additional documents in the chain of title are listed on a supplemental sheet.

☐ Copies of assignments or other documents in the chain of title are attached.

(NOTE: A separate copy (i.e., the original assignment document or a true copy of the original document) must be submitted to Assignment Division in accordance with 37 CFR Part 3, if the assignment is to be recorded in the records of the USPTO. See MPEP 302.08)

The undersigned (whose title is supplied below) is authorized to act on behalf of the assignee.

Nov. 6, 2003

Date

770-448-2193

Telephone number

Robert B. McIntosh

Typed or printed name

Robert B. McIntosh

Signature

Sec. V.P. and General Counsel

Title

This collection of information is required by 37 CFR 3.73(b). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 422 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1459, Alexandria, VA 22313-1459.

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